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No. 76-1701

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

TENNESSEE VALLEY AUTHORITY,
Petitioner,

v.

HIRAM G. HILL, JR., ZYGMUNT J. B. PLATER, DONALD S. COHEN, THE AUDUBON COUNCIL OF TENNESSEE, INC., THE ASSOCIATION OF SOUTHEASTERN BIOLOGISTS,
Respondents.

BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL, INC., AS AMICUS CURIAE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Natural Resources Defense Council, a national environmental protection organization, is filing this brief as an *amicus curiae* to argue that this Court should deny certiorari. This brief is filed with the consent of the parties, as evidenced by letters from their counsel which have been filed with the Clerk.

STATEMENT OF INTEREST

The interest of the Natural Resources Defense Council (NRDC) arises from the interest of its members in the

protection of endangered and threatened species and conservation of other genetic resources. NRDC is a national membership organization dedicated to the preservation and defense of the human environment and natural resources of the United States. NRDC's members currently total over 25,000, including members in Tennessee who would be directly affected by reversal of the Sixth Circuit's decision and members in all the other States who would benefit from strict enforcement of the Endangered Species Act.

ARGUMENT

The Sixth Circuit Court of Appeals held that petitioner's completion of Tellico Dam would violate § 7 of the Endangered Species Act of 1973, 16 U.S.C. § 1536 (Supp. V 1973) by destroying critical habitat of the snail darter, a fish listed by the Department of the Interior as an endangered species. It found that continued Congressional appropriations for the Tellico Project did not exempt the Project from the Act. The Court thus reversed the decision of the District Court and permanently enjoined "all activities incident to the Tellico Project which may destroy or modify the critical habitat of the snail darter" until "Congress, by appropriate legislation, exempts Tellico from compliance with the Act, or the snail darter has been deleted from the list of endangered species or its critical habitat materially redefined." 549 F.2d at 1075.

This case presents no novel or important questions of law, nor does it conflict with decisions from other circuits. It was correctly decided by the Court of Appeals. This Court, therefore, should deny certiorari. *See* Sup. Ct. R. 19(1).

I.

THERE IS NO CONFLICT BETWEEN THE CIRCUITS CONCERNING REPEAL OF SUBSTANTIVE LAW BY CONGRESSIONAL APPROPRIATIONS

Petitioner argues that statements in the House and Senate Appropriations Committee reports for the Tellico Project demonstrate the intent of Congress to exempt the Project from The Endangered Species Act. (Petition at 7-8, 13.) This Court however, has held in a line of cases dating from 1883 that appropriations statutes repeal substantive law only if the appropriations statute itself contains a specific expression of intent to repeal. "The whole question depends on the intention of Congress *as expressed in the statutes.*" (Emphasis supplied.) *United States* v. *Mitchell*, 109 U.S. 146, 150 (1883).[1]

The Court of Appeals rejected petitioner's claim that the language of the committee reports for the appropriations act impliedly repealed the Endangered Species Act as to the Tellico Project. Since there was no specific language in the act itself expressing an intent to exempt the Tellico Project, the Court of Appeals was plainly correct.

Petitioner further claims that the circuits diverge on the issue of repeal by appropriations statutes, some "view[ing] appropriations legislation as virtually incompetent evidence on congressional intent" and others "recogniz[ing] its relevance." (Petition at 20.) None of the cases cited by petitioner, however, supports the existence of such a conflict. In *United States* v. *Dickerson*, 310 U.S. 554 (1940), this Court reversed a decision by the Court of Claims awarding the defendant, under a 1922 statute, a bonus for reenlisting within three

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[1] *See also United States* v. *Vulte*, 233 U.S. 509 (1914); *United States* v. *Langston*, 118 U.S. 389 (1886).

months after an honorable discharge. This Court held that he was prevented from receiving his bonus because appropriations measures in effect at the time of his re-enlistment expressly denied the bonus notwithstanding the 1922 act.[2] Repeal therefore occurred because it was specifically mandated in the appropriations law and "the earlier and later statutes [were] irreconcilable." *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974).

Friends of the Earth v. *Armstrong*, 485 F.2d 1 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974), and *Environmental Defense Fund* v. *Corps of Engineers*, 492 F.2d 1123 (5th Cir. 1974), the other cases cited by petitioner as directly supporting its position, are also inapposite. In *Friends of the Earth*, a statute which prohibited any dam or reservoir from being constructed within a national monument was held repealed as to the Rainbow Bridge National Monument because of expressions of intent to exempt in twelve separate appropriations statutes between 1962 and 1973.[3] The *Environmental Defense Fund* case did not even address the issue of repeal of substantive law by appropriations measures.[4]

In short, decisions of this Court and the courts of appeals on this issue are consistent, and there is no need to resolve any inconsistency.

[2] The appropriations measure provided "that 'no part of any appropriation contained in this or any other Act for the fiscal year ending June 30, 1939, shall be available for the payment' of any enlistment allowance for 're-enlistments made during the fiscal year ending June 30, 1939, notwithstanding the applicable portions of sections 9 and 10' of the Act of June 10, 1922." 310 U.S. at 555.

[3] The 1956 Colorado River Storage Act, 43 U.S.C. § 620 *et seq.*, provided, in part, that "[i]t is the intention of Congress that no dam or reservoir constructed under the authorization of this Act shall be within any national park or monument." It later became apparent that the waters of Lake Powell, which was to be created by the Glen Canyon Dam authorized by the Storage Act, would partially flood the Rainbow Bridge National Monument. The twelve appropriations acts included this proviso: "Provided, That no part of the funds herein appropriated shall be available for construction or operation of facilities to prevent waters of Lake Powell from entering any National Monument." The court held that the Storage Act therefore did not apply to the Rainbow Bridge National Monument. 485 F.2d at 6-8.

[4] The Fifth Circuit held there that the Corps had fully complied with the procedural requirements of the National Environmental Policy Act, 42 U.S.C. § 4331 *et seq.* (1970), and that Congress after evaluating the environmental impact statement, had decided to continue funding. No question of the project's exemption from the Act was involved. "Several courts have indicated that legislative appropriations should not be construed to constitute an implied repeal of the duties imposed on agencies by NEPA . . . However, these authorities do not speak to the circumstances of this case." 492 F.2d at 1141.

II.

THE DECISION BELOW TO ENFORCE THE ENDANGERED SPECIES ACT BY INJUNCTION PRESENTS NO IMPORTANT QUESTION UNDER THE ACT

Petitioner takes issue with the Sixth Circuit's holding that petitioner's violation of the Endangered Species Act necessitates injunctive relief, arguing that the courts must balance the benefits of completing the Tellico Project against the Congressional policies set forth in the Endangered Species Act in order to determine whether an injunction should issue. The Sixth Circuit concluded that resolution of such a controversy, involving competing public policies, is properly left to the Congress. This decision is consistent with established law and does not present a "significant question" as alleged by petitioner. (Petition, p. 23.)

This Court has repeatedly held that when a federal statute is being violated, a final injunction will issue to prevent continued injury. In *United States* v. *San Fran-*

cisco, 310 U.S. 16 (1940), this Court held that an injunction to prevent continued misuse of federal lands should issue because the "course of conduct [was] forbidden by law," 310 U.S. at 28, and an equity court has the responsibility "to make a declared policy of Congress effective." 310 U.S. at 31. *Accord*, *United States* v. *Trinidad Coal & Coking Co.*, 137 U.S. 160, 167 (1890).

Numerous lower court decisions are to the same effect. This Court recently denied certiorari in *National Wildlife Federation* v. *Coleman*, 529 F.2d 359 (5th Cir. 1976), *cert. denied*, 97 S. Ct. 489 (1977), in which an injunction was issued to enforce the Endangered Species Act without any balancing of competing public values. *See also Wilderness Society* v. *Morton*, 479 F.2d 842, 891-93 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973); *Lathan* v. *Volpe*, 455 F.2d 1111 (9th Cir. 1972); *Fleming* v. *Moberly Milk Prods. Co.*, 160 F.2d 259, 270-71 (D.C. Cir.), *cert. denied*, 331 U.S. 786 (1947); *Buscaglia* v. *District Court of San Juan*, 145 F.2d 274, 287 (1st Cir. 1944), *cert. denied*, 323 U.S. 793 (1945).

CONCLUSION

For the reasons stated, the petition by Tennessee Valley Authority for a writ of certiorari should be denied.

Respectfully submitted,

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